



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 123 OF 2013

HILLARY KIPTANUI KOECH..... APPELLANT

VERSUS

AYUB MORII KIPKORIR..... 1ST RESPONDENT

SAMMY KIPRUTO ROP..... 2ND RESPONDENT

(Being an appeal from the judgment of Chief Magistrate at Eldoret by Hon. C.G.Mbogo dated 13th Sept. 2013 in Eldoret CMCC. 542 of 2011.)

JUDGMENT

1. The appellant (**HILLARY KIPTANUI KOECH**) had sued the 1st respondent (**AYUB MORII KIPKORIR**-) and the 2nd respondent (**SAMMY KIPRUTO ROP**) in the lower for damages for injuries he sustained following an accident along **Eldoret- Iten** road involving motor-vehicle registration no. **KAT 574 W** in which he as a passenger in. He alleged that the vehicle he was traveling in was hit by motor-vehicle reg. no. **KBJ 760N** which was owned by the 1st respondent and driven by the 2nd respondent.

2. The respondents had denied the appellant's allegations on negligence. The parties had entered a consent on liability on 19.10.2012 on liability in the ratio of **80:20% in favor of the appellant as against the respondents.**

3. The matter proceeded for assessment on quantum of damages, and judgment was thereafter entered on general damages on 13.9.2013 in favor of the plaintiff as against the defendants for a sum of **Ksh.500.000/-**, **special damages Ksh. 77,275/-**, less contribution to give a net figure of **Ksh.462.120/-**. The plaintiff was aggrieved with this judgment and appealed against raising the following grounds:

i. That the trial magistrate erred in both fact and in making an award that was manifestly low as to make it an erroneously estimate of the damages to which the appellant is entitled.

ii. That taking into account the totality of the evidence presented, the trial magistrate misdirected himself in both fact and law in awarding the appellant a sum of Ksh.500.000/- as general damages.

iii. That the trial magistrate misdirected himself in dismissing the appellant's claim for loss of future earning capacity.

iv. That the trial erred in both fact and law in acting on the wrong principles of law and thereby arriving at the wrong conclusion.

v. That the trial magistrate erred by failing to correctly evaluate the evidence and thereby arrived at a wrong conclusion.

The appellants urged the court to set aside the judgment and substitute an order enhancing the award.

4. The appellant was 22 years as at the time, not married and depended on his parents for upkeep. He was employed by **Peter Chirchir** as a casual labourer earning 500/= per day,. He was admitted at **Moi Teaching and Referral Hospital** for 3 months. He was injured on both legs, stomach and right hand. He paid a bill of **Ksh.78.975/-**. He was confined to a wheel chair for many months after his discharge. He was attended to by **Dr. Sokobe** who prepared a medical report and charged him **Ksh.3.500/-**. He could not work as a brick layer since he had plates on his legs, and brick laying involved use of legs. He further prayed the court to award him loss of future earnings **Ksh.10.000/-** per month. He went for a second medical report and the doctor assessed permanent disability at **20%**, his report further indicated he would develop post traumatic osteoarthritis as he grew old. The appellant had gained full movements in all joints of both legs, he was able to walk without aid.

5. On cross –examination he testified that he could no longer work as a brick layer but he could work as a shop keeper.

6. **Peter Chirchir (PW2)** testified and stated that he had employed the appellant as a casual employee, he paid him **Ksh.2500/= for 5 days**. However, the appellant no-longer worked for him since he was involved in an accident. On cross-examination he stated that the appellant had worked for him for 2 years.

7. The trial magistrate in his judgment noted that the appellant confirmed that despite his limitations as a result of the injurie, he could work as a shopkeeper, so there was no basis for holding that he suffered 50% disability, and instead used the percentage assessed by Dr Gaya in his report. He thus awarded a sum of Kshs 500,000/- as general damages, and special damages in the sum of Kshs. 77,275/- which was then subjected to the agreed percentage on liability, to give a net figure of Kshs. 462,120/-.

8. The parties agreed to canvass the appeal by way of written submissions, where the appellant pointed out that he sustained the following injuries:

i. Fracture both femur

ii. Fracture left tibia/fibula

iii. Blunt injury to the head with forehead bruises

iv. Injury to abdominal internal organs requiring operation.

9. It was submitted that the court had erred by failing to award loss of future earnings on the basis that it was not pleaded and the amount awarded by the court was so low compared to the injuries sustained.

10. The court was referred to the case in **Selle v. Associated Motor Boat Co. [1968]E.A** where the court has been reminded to invoke its powers and reconsider the evidence tendered during hearing and draw its own conclusions bearing in mind it did not have the pleasure of seeing or hearing the witnesses.

11. On loss of future earnings, it was submitted that the same is part of general damages for pain, suffering and loss of amenities. In **Butler v. Butler [1984] KLR 225,235** Chesoni Ag. JA observed as follows:

“loss of earning capacity or earning power may and should be included as an item within general damages, but where it is not so included, it is not improper to award it under its own heading as the learned judge did in this case.”

The court of Appeal in **Cecilia W. Mwangi & Anor v. Ruth W. Mwangi [1997] eKLR**, gave a difference between loss of earnings and loss of earning capacity where it was held:

“that loss of earnings was a special damage claim which had to be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” could be classified as general damages but they had to be proved on a balance of probability.”

Also the Court of Appeal in **Mumias Sugar Company Ltd. V. Francis Wanalo [2007] eKLR** the court illustrated on loss of earning capacity. In the instant case, the appellant had lost his capacity as a brick layer for a period of 5 years, thus his capacity as a brick layer had been diminished as he could no longer carry out such work. He urged that a sum of **Ksh. 3,840,000/-** would be adequate compensation (**10,000 x 12months x 40 years**).

12. Further the court urged to refer to the principles set in **Butler v Butler** (supra) in making an award under loss of earning capacity. The appellant had testified he was **22 years** and he earned **Ksh.500** per day translating to **Ksh.10.000/-**. As a result of the accident he was unable to work as a brick layer.

13. Further the court had erred in relying on **Dr. Gaya’s** report instead of **Dr. Sokobe’s** report which showed a permanent disability of **50%**. The court was to form its own opinion based on the two reports, which were at variance. Counsel urged the court to find a permanent disability at **35%**, in **George Kirianiki v. Michael Mutwiri, Meru HCCC No. 14 of 2001**, it was held that a medical opinion was an expert opinion and was not binding on the court although it could be given consideration where there is no contrary opinion.

14. On general damages, it was submitted that the award of **Ksh.500.000/-** was low. The court was referred to **Peter Ngugi Kimani v. Joseph Kariuki [2018] eKLR** where the appeal court can only interfere with an award of damages by the lower court unless the appellant can prove that a relevant factor was not taken into consideration or that the award was based on wrong principles or was not based on evidence. Though the appellant had healed he had developed a limp on the left leg, the court had failed to consider the medical reports.

15. It was argued that the award could not reconstitute the appellant back to his initial physical and/or psychological position as was held in **H.West & Son Ltd v. Shephard [1964] AC 326 AT 345**. Therefore, the award had to be reasonable.

16. Further that the court had erred in relying on the respondents’ authorities yet cases are a guide, since the injuries sustained by the parties cannot be the same, see **Alphonse Muli Nzuki v. Brian Charles Ochuodho [2014] eKLR**. In this instant case the court was urged to make an award of **Ksh.2.500.000/=**. The appellant cited various cases including **Mary Pamela Oyioma v. Yess Holdings Ltd [2011] eKLR**, **Samwel Mwangi Kamau v. Joseph M.Kimemia & Anor(2004) eKLR**, **Kombo Amani V. A.G & 2 Ors, Mbs HCCCC No. 298 of 1989**.

17. On costs, counsel urged that though he failed to pray for costs, the court needed not confide itself to issue on costs as provided under **Order 42 Rule 4 of the Civil Procedure Rules**. The Court of Appeal in **Margaret Njeri Mbugua v. Kirk Mweya Nyaga [2016] eKLR**, the court diminished the said order and opined that the appellate court had the necessary power to consider grounds of appeal other than those set out in the memorandum of appeal provided parties were given sufficient opportunity to address the court on the new grounds. The respondents had been given ample time to respond on the same. The counsel urged the appeal be allowed with costs.

18. The respondent in the submissions pointed out that as the first appellate consideration had to be given the whole evidence afresh and this court must make its own conclusion. See **Selle & Anor v. Associated Motor Boat Co. Ltd & Ors(1968) EA 123** and **Suluenta Kennedy Sita & Anor v. Jeremiah Ruto(suing as the legal representative of the Estate of Joyce Jepkemboi) 2017eKLR**. That appellate court need not interfere with the findings of the court if the same was not based on the wrong findings.

19. On loss of future earning it was argued that the same is a special damage claim, which has to be specifically pleaded and strictly proved, based on one's monthly salary and the years expected to continue working. As was held in **Equity Bank Ltd v. Gerald Wang'ombe Thuni [2015] eKLR** and **Henry Moriasi Osiemo v. Quid J. Mohammed & Merali Mfadhuli [2001] eKLR**. The appellant failed to plead and prove the same. Further, that the appellant in cross-examination had stated that he could work as a shopkeeper thus the claim failed.

20. It was contended, the court was within its judicious discretion to award general damages. There was no specific age for retirement in the private sector. In **Ndoro Kaka Kakondo v. Salt Manufacturers (K) Ltd [2016] eKLR**, the court held as follows:

“There is no law setting retirement age at 60 years, the retirement age in the private sector being left to the parties to set , in their workplace labor contracts. If there is a law in the public sector setting the retirement age for public servants, it must not be taken as applying across the entire labor market. It was duty of the appellant to justify his multiplier principle. He did not. The trial court took the correct approach in adopting an educated impressionistic award, as guided by the authority of Henry Moriaso Osiemo.”

21. The appellant had testified that he earned Ksh.500/- per day though he failed to produce any receipt or any other document in regard to that. In **Gerald Oyugi v. Evans Okeyo Mochere [2019] eKLR**, the court opined that it would consider the age, ability to seek alternative opportunities, the lump sum award to be awarded to earn an income and other vicissitudes of life and imponderables.

22. To fortify the argument that, an award on general damages should represent a fair compensation but should not be in excess the respondent cited G. Dulu (J) in **Joseph Musee Mua v. Julius Mbogo Mugi & 3 Ors [2013] eKLR**. It was pointed out that the injuries had healed though the medical report by **Dr. Sokobe** indicated a permanent disability of 50% and Dr. Gaya's report indicated a medical disability of 20%. The counsel urged the court to refer to **TAM (minor suing thro' her father next friend JOM) v. Richard Kirimi Kinoti & Anor [2015] eKLR**, where the plaintiff sustained a fracture of the left femur, lacerations on the left temple and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded ksh.250.000/=.

23. With regard to the issue of costs, counsel referred to the provision under section 27 of the **Civil Procedure Act**, the court may give interest on costs at any rate, citing the decision in **Supermarine Handling Services Ltd. V. Kenya Revenue Authority, Civil appeal no. 85 of 2006**, the Court of Appeal held that the costs of and incidental to all suits shall be in the discretion of the court and **Ndoro Kaka Kakonda v. Salt Manufacturers(K) Ltd [2016] eKLR**.

Analysis and determination.

24. The following issues arise for determination.

i. Whether the trial court erred in failing to award loss of future earnings

ii. Whether the award was so low compared to the injuries sustained.

25. The duty of a first appeal court is well set out in **Selle & Anor v. Associated Motor Boat Co. Ltd & Ors (1968) EA 123** the court held as follows:

“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

26. The main contention here is that the trial court erred when it failed to award loss of future earning. In the pleadings at paragraph 7 the appellant prayed for general damages for pain and loss of amenities and special damages which included an abstract, medical report and medical costs. The trial court had dismissed the prayer on loss of future earnings citing that the appellant had not pleaded the same. The appellant on the other hand stated that the same did not have to be pleaded as it fell under the category of general damages.

27. In his testimony, the appellant had stated that he was seeking for loss of future earning from the respondents. This came up during trial. The appellant has also submitted on it on appeal. The appellant in his pleadings did not plead for loss of future earning capacity. The respondents submitted that loss of earning was to be claim as special, they did not submit on loss of future earning capacity as prayed by the appellant, though their heading reads as, **“whether the appellant is entitled to the claim for loss of future earnings”**. In general, all he was seeking for in his plaint was loss of earning capacity. Both parties had to get it right the distinction between loss of earning and loss of future earning capacity. In **John Kipkemboi & Anor v. Morris Kedolo [2019] eKLR** the court opined as follows on loss of earning capacity and loss of future earning capacity.

“It is proper that for the sake of the parties herein, a clarification be made that the award sought was for loss of earning capacity and not loss of future earnings. The distinction between loss of earning capacity and loss of future earnings was brought out in the case of **SJ vs. Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

*“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in **Fairley V John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40 at pg. 14** wherein Lord Denning M.R. said as follows:*

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

19. In awarding damages under this head, the Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo (2007) eKLR** stated that

“...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

(In regard to the above the court did not err in failing to award the loss of future earning.)

28. The appellant is right when he states that loss of earning capacity is deemed to be part of general damages for pain, suffering and loss of amenities. The trial court considered the evidence on record and the authorities relied on to make an estimate. The appellant urged that the amount awarded was so low. This court is guided the decision in the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** which set out the parameters under which an appellate court will interfere with an award in general damages when it held that:

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’

Further In **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held that: -

*‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see **Mariga V Musila [1984] KLR 257**).’*

29. The appellant produced two medical reports. Dr. Sokobe’s report had a permanent disability of 50% and the one made by Dr. Gaya indicated a 20% permanent disability. The claim for loss of earning capacity need not be pleaded as urged by the respondents. The principle was upheld in **Mwaura Muriuki .v. Suera Flowers Ltd & Anor [2014] eKLR** in regard to loss of earnings that:-

“The claim for loss of earning capacity is general damages claim and is deemed to flow directly from the claim and need not be pleaded”.

The appellant gave evidence that he was no longer working as a brick layer but he could engage as a shop keeper is an award of Ksh.500.000/- adequate compensation, bearing in mind the residual effects of the injuries?

30. The appellant pleaded the following injuries: **fracture of both femur, fracture of left fibula/tibia, blunt injury to the head with forehead bruises and injury to abdominal internal organs requiring operation**. I note that the authorities cited by the appellant had almost similar injuries and bearing in mind the opinion in the two medical reports plus the holding in **Butler v Butler [1984] KLR 225, 235** to the effect that loss of earning capacity or earning power may and should be included as an item within general damages, but where it is not so included, it is not improper to award it under its own. In this instance, the trial court actually took into consideration the effects of the injuries on the appellant’s and was of the view that he could still be able to earn a living as a shopkeeper- a fact confirmed by the appellant. However I think it would have been helpful for the trial court to take cognizance of the current economic trends which affects the availability of capital to even start a simple enterprise like operating a kiosk, the lack of employment opportunities in this country and I am persuaded that it is fair and just to interfere with the award and take into account how the injuries have impacted on the appellant’s earning capacity.

31. Indeed, I am mindful of the court of Appeal's pronouncements in **Cecilia W. Mwangi & Anor v Ruth W. Mwangi [1997] eKLR**, gave a difference between loss of earnings and loss of earning capacity plus the findings, Consequently, I hold that the award in general damages was low compared to the injuries sustained and set aside the same. It is substituted with an award of Kshs, 1,000,000/- (One million only). The respondent shall bear the costs of this appeal.

Delivered and dated this 29th day of January 2020 at Eldoret

H. A. OMONDI

JUDGE